

(2014) 09 GAU CK 0020

In the Gauhati High Court

Case No : Writ Petition (C) No. 3594/2014

All Assam Secondary Additional (Contractual) Teachers
Association

APPELLANT

Vs

The State of Assam

RESPONDENT

Date of Decision : 26-09-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226, 32
Police Act, 1861 — Section 17

Citation : (2015) 5 GLT 253

Hon'ble Judges : Tinlianhang Vaiphei, J

Bench : Single Bench

Advocate : P.K. Goswami, J. Borah, A.M. Bazarbaruah, M. Barman, B.P. Borah
and B. Taid, Advocate for the Appellant; S. Saika, Sr. SC, Advocate for the
Respondent

Judgement

Tinlianhang Vaiphei, J.—In this writ petition, the petitioners are challenging the legality of the advertisement dated 30-6-2014 for direct recruitment for the posts of graduate teachers on the basis of the eligibility criteria prescribed under the Assam Secondary Education (Provincialization) Service (Amendment) Rules, 2012 ("the amended Rules" for short).

2. The petitioner No. 1 is an association comprising of 7,764 contractual teachers under the name and style of "All Assam Secondary Education (Contractual) Teachers Association", which was established in the year 2011-12 and is registered under the Societies Registration Act, 1860 bearing registration number KAM(M)/240/A26/55. The case of the petitioners is that the members of the association were appointed as graduate teachers on contractual basis by the notification dated 10-6-2010 by a cabinet decision under the "Scheme to strengthen and improve the quality of secondary education in the State of Assam" ("the Scheme" for short) except in the BTAD areas, Cachar Hills and Karbi Anglong Districts, which were later implemented by the letter dated 14-6-2010) for the core subjects of English, Social Science, Mathematics and

General Science. Pursuant to the advertisement dated 10-6-2010, all the members of the petitioner-association, being qualified, had duly applied and were selected in the selection process conducted by the Selection Committee constituted under. Upon being selected and publication of the select list, the members of the association were engaged as contractual teachers. As provided for in the scheme, the respondent authorities upon review of the performance of the members of the association had decided to continue the scheme and accordingly extended their engagement from time to time by general orders. On the basis of the notification dated 10-6-2010, according to the members of the petitioner-association, they were given to understand that the proposed appointment of the contractual teachers would be co-existence with the scheme and any extension and continuance of the scheme would also by implication mean continuance of their contractual engagement. They were also given to understand that the other condition of their engagement would be governed by the rules of recruitment prevailing on the date of the notification, i.e. the Assam Secondary Education (Provincialized) Rules, 2003, Rule 8 whereof refers to the provision for engagement of teachers on contractual basis under the scheme of strengthening of secondary education.

3. On 30-6-2014, the impugned advertisement was issued by the Member-Secretary, TET Empowered Committee for Secondary Education wherein the State-respondents invited applications from contractual teachers engaged in secondary education under the said scheme to appear in a special Teacher Eligibility Test (TET) with a view to implement the policy of the Rules, which prescribes the qualification for graduate teachers to be BA/B.Sc./B.Com with 50% marks with B.T./B.Ed. degree from any recognized university (though possession B.Ed./B.T. degrees have now been relaxed till 1-1-2015). It may be noted that under the qualifications prescribed in the special scheme by which the members of the petitioner-association were appointed was graduation with brilliant academic career in the relevant discipline. The members of the petitioner-Association are essentially aggrieved by the fact that (a) when they were given the contractual appointments on 10-6-2010, possession of B.Ed./B.T. degrees were not insisted upon; (b) the agreement executed by them when they were appointed did not contain any condition for holding of the special TET; (c) as the members of the petitioner-association were appointed before the coming into force of the amended Rules, their service conditions cannot be governed by the amended Rules and (d) impugned advertisement prescribing the minimum qualifications of B.A., B.Sc., B.Com. with 50% marks with B.Ed./B.T. degree from a recognized university is violative of the earlier advertisement by which they had been appointed and is, therefore, impermissible. This is how this writ petition has been filed for appropriate reliefs.

4. While opposing the writ petition, the respondent authorities in their counter-affidavit maintain that the members of the petitioners were temporarily appointed for a period of eleven months on contractual basis on execution of service agreements between them and the respondents: their engagements as

additional teachers in Science and Humanities subjects was made additionally without utilizing the existing regular sanctioned posts as their engagement was for a specific temporary period. Their engagement as additional teachers have been made no regular procedure for selection of teachers at their grade as stipulated in the existing service rules was followed including reservation policy. The existing arrangement of their contractual appointments will continue till 31-3-2015, while an endeavour is made to appoint regular teachers. There is no provision in the service rules to directly regularise the services of contractual appointees like the petitioners against sanctioned posts. However, However, provision has been made in the amended Rules to give bonus marks at the rate of their services rendered as Additional Teachers in the recruitment of teachers against regular sanctioned posts. The impugned advertisement is issued in conformity with the requirements of the amended Rules, which does not contemplate direct regularisation of against regular sanctioned posts. There can be no appointment of teachers under the existing law in force who do not have TET qualification amongst other eligibility criteria. The special TET is being conducted only to provide an opportunity to absorb the members of the petitioner-association against regular vacancies. The members of the association must adhere to the terms and conditions of impugned advertisement for their absorption against regular vacancies.

5. After perusing the pleadings of the parties and after hearing the learned counsel appearing for both the rival parties, it becomes clear that the sole question which falls for consideration in this writ petition is whether, on the facts and circumstances of this case, it is mandatory for members of the association to undergo a special TET in terms of the impugned advertisement? Unfolding his submissions, Mr. P.K. Goswamy, the learned senior counsel for the petitioner-association that members of the petitioner-association were appointed under the Scheme after undergoing rigorous selection process as provided in therein: the selection was based on an evaluation of 400 marks, and the selection process in which they participated was held after open advertisement in the year 2010. According to the learned senior counsel, having been subjected to more rigorous test to determine their eligibility and suitability as teacher they cannot be subjected to further eligibility test in the name of Special TET: it is nobody's case that members of the association did not perform their assignments satisfactorily. He further argues that the amendment to Rule 10 deals with academic and professional qualifications of direct recruitment, which is introduced as a proviso by providing that in addition to such academic and professional qualifications mentioned in Schedule-II for direct recruitment, all candidates shall have to appear and pass TET by securing a minimum of 60 marks for general category and 55 marks for reserved category candidates: the requirement of TET being in addition to the academic and professional qualification for direct recruitment, the same is, therefore, essentially a pre-recruitment test. He, therefore, maintains that the imposition of special TET for contractual appointees like members of the petitioner-association, who are already in service, is contrary to and is

inconsistent with the proviso to Rule 10 of the amended Rule.

6. It is also the contention of the learned senior counsel that though the special TET is professed to be introduced to regularize the services of the members of the association against sanctioned posts, but when they attempted to submit the online application forms as prescribed, the system was not accepting them as they do not fulfil the requirements of 50% marks: under the guise of introducing a special TET to regularize the members of the association for the sanctioned posts, they are now rendered ineligible to apply for the posts. Contending that the impugned advertisement is unreasonable, unconscionable, arbitrary and discriminatory, the learned senior counsel urges this Court to quash it and pass appropriate orders to protect the interest of the members of the petitioner-society. To fortify his submissions, he refers to the decisions of the Apex Court in *Y.V. Rangaiah and Others Vs. J. Sreenivasa Rao and Others*, ; *P. Mahendran and others Vs. State of Karnataka and others*, ; *B.L. Gupta and Another Vs. M.C.D., and Vikas Pratap Singh and Others Vs. State of Chhattisgarh and Others*, and *Nihal Singh and Others Vs. State of Punjab and Others*, .

7. Mr. S. Saikia, the learned senior standing counsel for the Secondary Education Department, Assam, supports the impugned decision of the respondent authorities and submits that the members of the petitioner-association have no vested to a particular eligibility for their recruitment to the post of graduate teacher. It is his submission that the selection process has not started, and it is, therefore, perfectly within the discretion of the respondent authorities to prescribe better and further qualifications for the post of graduate teacher: the policy of the Government is to select the best candidate for teaching students. The eligibility criteria prescribed in the impugned advertisement are insisted upon consistent with Rule 10 of the Assam Secondary Education (Provincialization) Service Rules, 2003 as amended in 2012. He maintains that the members of the petitioner-association are merely contractual appointees, whose services can be discontinued on the expiry of their contractual terms, and they cannot claim regularization of their services as held by the decision of the Constitution Bench of the Apex Court in *Vishwant Kumar Vs. Madan Lal Sharma and Another*, .

8. According to the learned senior standing counsel, over 200 contractual teachers have already applied for the post, and nobody prevents the members of the petitioner-society to apply for the post provided they are eligible for the post. This is not a case, submits the learned senior counsel for the Department, in which the rule of the game is changed in the midst of the recruitment process, and, as such, the petitioners have no legitimate grievance to make. Moreover, contends the learned counsel, it is the rules which are prevalent at the time when consideration takes place for recruitment, which would be applicable, and there is no absolute rule that vacancies are to be filled invariably by law existing on date when vacancy occurs. He heavily relies on the following decisions of the Apex Court to support his contentions:-- *Official Liquidator Vs. Dayanand and*

Others, ; Harminder Kaur and Others Vs. Union of India (UOI) and Others, ; Deepak Agarwal and Another Vs. State of Uttar Pradesh and Others, and State of M.P. and Others Vs. Raghuveer Singh Yadav and Others, .

9. As already noticed, the members of the petitioner-association were engaged on contractual basis under the "Scheme to strengthen and improve the quality of secondary education in Assam" for teaching in the core subjects i.e. English, Social Sciences, Mathematics and General Studies. Under the Scheme, the School Management Committee of every Secondary Education/High School is authorized to select and engage such contractual teachers as per the requirements of the subject teacher for the subjects mentioned. The Selection Committee for the purpose of selecting the candidates consisted of the Deputy Commissioner or his representatives, President of the School Management Committee, the School Head as Member-Secretary and one Subject Expert (Science, Mathematics & English or other subject as the case may be) as Member. The School Management Committee called all qualified candidates for an interview. When the number of applicants was more, the School Management Committee set up the benchmark and called only those applicants who possessed the benchmark. The State Government gave wide publicity of the Scheme both through print and electronic media by advertising the posts to invite applicants having the requisite qualifications. The Selection Committee prepared a list of the selected candidates separately for each of the subjects containing the names of the selected candidates equal to the number of advertised vacancies in order of merit, which were submitted to the Deputy Commissioner of the District for approval. The Deputy Commissioner before according his approval made an enquiry, if he deemed it fit. It is the uncontroverted case of the petitioners that members of the petitioner had gone through the aforesaid rigorous selection test provided for in the Scheme to determine their eligibility and suitability. I have also gone through the eligibility criteria and the selection procedure prescribed in the impugned advertisement. True, such criteria and selection procedure prescribed for special TET could possibly be a little bit better or more rigorous than the eligibility criteria and selection procedure required of by the Scheme by which the members of the petitioner-association were appointed, but then it can never be said that the manner of their contractual appointment was arbitrary or was by sacrificing merit. In other words, their engagements were made consistent with Articles 14 and 16 of the Constitution.

10. It may be noted that though the members of the petitioner-association were appointed on contractual basis, the posts held by them are sanctioned posts as indirectly admitted by the respondent authorities in para 7 of their counter when they stated that "... the engagement of the petitioner as additional teachers in Science and Humanities subjects was made additionally without utilizing the existing regular sanction (sic) post as their engagement was for a specific temporary period". The inference is thus irresistible that the sanctioned posts now being filled up in terms of the impugned advertisement were the vacancies in existence when the members of the petitioner-association were appointed on

contractual basis. Though this is not a case where the rules of the game are being changed in the midst of the recruitment process, the members of the petitioner-association, who have already undergone the vigorous selection process as provided for in the Scheme should not be insisted to undergo another selection test, be it in the name of special TET or otherwise: to do so would be most unfair, unreasonable and unconscionable and cannot withstand the test of Article 14 of the Constitution. More so, when they are now rendered ineligible for taking part in the special TET examination under the impugned advertisement as they do not have new qualifications prescribed in the advertisement. You cannot simply first engage them on contractual basis and then later on disqualify them when the sanctioned posts are being filled up on regular basis as if you give something to them with your right hand and then take simultaneously it away with your left hand. The process of selection adopted in identifying the members of the petitioner-association cannot be said to be unreasonable or arbitrary in the sense that it was devised to eliminate other eligible candidates. In my judgment, after undergoing one selection process under a particular scheme consistent with the acceptable method of recruitment permissible by Articles 14 and 16 of the Constitution, to insist the members of the petitioner-association to needlessly undergo another selection test will be irrational, more so, when they are disqualified from participating in such special TET.

11. With due respect, an analogy can be drawn from the recent case of Nihal Singh and Others Vs. State of Punjab and Others, decided by the Apex Court. In that case, there was large-scale disturbance in the State of Punjab in 1980s. The state was not in apposition to handle the prevailing law and order situation with the available police personnel, and, hence resorted to Section 17 of the Police Act, 1861 for appointing Special Police Officers (SPOs). The SPOs were assigned the duty of providing security to banks, for which the financial burden was to be borne by the Banks. However, it was clearly understood that as per the provisions of the Act, such police officers were to be under the discipline and control of the SP of the district concerned. In the background of such appointees, including the appellants approached the High Court seeking appropriate directions for regularization of their services. The writ petitions were dismissed and the respondent State was directed to consider cases of the petitioners in accordance with law. Pursuant thereto, the SSP purported to consider the cases of the appellants and by the order dated 23-4-2002 rejected their claim to consider the cases of the appellants and by the order dated 23-4-2002 rejected their claim on the ground that the appellants were working as guards with various banks and their wages were being paid by such banks and, therefore, their claim for regularization, if any, lay only with the banks concerned and not the Police Department. Challenging the said order, the appellants again approached the High Court by filing writ petition, which was dismissed by the impugned judgment. The appeal filed by the appellants before the Apex Court was allowed with costs. The observations of the Apex Court most relevant to the facts of this case are found at paragraph 21, 22 and 23 of the judgment, which

read thus:

"21. The question is whether this Court can compel the State of Punjab to create posts and absorb the appellants into the services of the State on a permanent basis consistent with the Constitution Bench decision of this Court in Secretary, State of Karnataka and Others Vs. Umadevi and Others, case. To answer this question, the ratio decidendi of Secretary, State of Karnataka and Others Vs. Umadevi and Others, case is required to be examined. In that case, this Court was considering the legality of the action of the State in resorting to irregular appointments without reference to the duty to comply with the proper appointment procedure contemplated by the Constitution: (SCC pp. 17-18, para 4)

"4.... The Union, the States, their departments and instrumentalities have resorted to irregular appointments, especially in the lower rungs of the service, without reference to the duty to ensure a proper appointment procedure through the Public Service Commissions or otherwise as per the rules adopted and to permit these irregular appointees or those appointed on contract or on daily wages, to continue year after year, thus, keeping out those who are qualified to apply for the post concerned and depriving them of an opportunity to compete for the post. It has also led to persons who get employed, without the following of a regular procedure or even through the backdoor or on daily wages, approaching the courts, seeking directions to make them permanent in their posts and to prevent regular recruitment to the posts concerned. The courts have not always kept the legal aspects in mind and have occasionally even stayed the regular process of employment being set in motion and in some cases, even directed that these illegal, irregular or improper entrants be absorbed into service. A class of employment which can only be called "litigious employment", has risen like a phoenix seriously impairing the constitutional scheme. Such orders are passed apparently in exercise of the wide powers under Article 226 of the Constitution. Whether the wide powers under Article 226 of the Constitution are intended to be used for a purpose certain to defeat the concept of social justice and equal opportunity for all, subject to affirmative action in the matter of public employment as recognised by our Constitution, has to be seriously pondered over."

It can be seen from the above that the entire issue pivoted around the fact that the State initially made appointments without following any rational procedure envisaged under the scheme of the Constitution in the matters of public appointments. This Court while recognising the authority of the State to make temporary appointments engaging workers on daily wages declared that the regularisation of the employment of such persons which was made without following the procedure conforming to the requirement of the scheme of the Constitution in the matter of public appointments cannot become an alternate mode of recruitment to public appointment.

22. It was further declared in Umadevi (3)⁵ case that the jurisdiction of the

constitutional courts under Article 226 or Article 32 cannot be exercised to compel the State or to enable the State to perpetuate an illegality. This Court held that compelling the State to absorb persons who were employed by the State as casual workers or daily-wage workers for a long period on the ground that such a practice would be an arbitrary practice and violative of Article 14 and would itself offend another aspect of Article 14 i.e. the State chose initially to appoint such persons without any rational procedure recognised by law thereby depriving vast number of other eligible candidates who were similarly situated to compete for such employment.

23. Even going by the principles laid down in *Umadevi*(3) case 5, we are of the opinion that the State of Punjab cannot be heard to say that the appellants are not entitled to be absorbed into the services of the State on permanent basis as their appointments were purely temporary and not against any sanctioned posts created by the State.

24. In our opinion, the initial appointment of the appellants can never be categorised as an irregular appointment. The initial appointment of the appellants is made in accordance with the statutory procedure contemplated under the Act. The decision to resort to such a procedure was taken at the highest level of the State by conscious choice as already noticed by us."

12. In the instant case, as found by me, there are, unlike *Nihal Singh*'s case (*supra*), already sanctioned posts to accommodate the members of the association. The manner in which the members of the petitioner-association were recruited can by no means be termed as irregular or irregular: the recruitment process consistent with Article 14 of the Constitution was rather followed while recruiting them even though the engagement was to be contractual in nature. Under the circumstances, in my judgment, there is no rationality for issuing the impugned advertisement for holding special TET if they decide give regular appointment to members of the petitioner-association. On the basis of the selection test already undergone by them, the respondent authorities cannot allow themselves to be exposed to the charge of arbitrariness, discrimination or illegality by needlessly conducting the special TET examination in so far as the members of the association are concerned. They appeared to have been adequately tried, tested and proven. More so, when no averment is made by the respondent authorities to the effect that the members of the petitioner-association are not suitable for discharging the duties of Graduate Teachers in the Secondary Schools unless they undergo another test in the name of special TET, which exercise is, in my judgment, unnecessary or superfluous.

13. For what has been stated in the foregoing, this writ petition succeeds. The respondent authorities are, therefore, directed not to require the members of the petitioner-association to participate in the ensuing special Teachers' Eligibility Test (TET) for regularization/absorption of their services against the sanctioned posts of Graduate Teachers in the Secondary Schools run by them in the State of Assam. No costs.